IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 6

B CLINTON WATSON, ET UX
Appellants-Petitioners

VS.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD. ET. AL
Appellee-Respondent

BRIEF ON BEHALF OF APPELLEE-RESPONDENT

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VS.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD. ET. AL
Appellee-Respondent

BRIEF ON BEHALF OF APPELLEE-RESPONDENT

OPINIONS DELIVERED IN THE COURTS BELOW

Appellants' brief correctly shows that in this case the opinion of the District Court is reported at 107 F. Supp. 494, and affirmed by an opinion of the Court of Appeals for the Fifth Circuit, reported at 202 F. 2d 407. On page 9 of their brief, appellants recognize that this case is a companion to the case of *Bish v. Employers' Liability Assurance Corporation*, 102 F. Supp. 343, affirmed 202 F. 2d 954. The opinion of the Court of Appeals in the present case (R.39) states that this case is one of a series of five tort actions. Actually, this case is one of a series of eight companion cases, all directly dealing with the identical

problem and uniformly supporting the decision in this case. The opinions of the United States District Courts and Court of Appeals, Fifth Circuit, are interwoven in this series of cases, and each, in substance, adopts the reasoning of the other, and adds slightly thereto. In order to have the complete basis of the opinions of the courts below in this case, the opinions of those courts in the other cases must be carefully reviewed. They are:

Belanger v. Great American Indemnity Co., 89 F. Supp. 736, affirmed 188 F. 2d 196;

Bayard v. Traders and General Insurance Company, 99 F. Supp. 343, motion for new trial denied, 104 F. Supp. 7;

Bish v. Employers Liability Assurance Corporation, 102 F. Supp. 343, affirmed 202 F. 2d 954;

Fisher v. Home Indemnity Company, 198 F. 2d 218;

Employers Mutual Liability Insurance Company v. Eunice-Rice Milling Company, 198 F. 2d 613, certiorari denied, 344 U. S. 876, 97 L. Ed. 679, 73 S. Ct. 171;

Mayo v. Zurich General Accident and Liability Co., 106 F. Supp. 579;

Mobley v. Kansas City Southern Railway Company, 202 F. 2d 117.

The opinions delivered by the courts below in this case are memorandum opinions incorporating the reasoning in the seven companion cases above set forth, all of which directly support the position of appellee and the decision rendered in this case. It will be noted that in *Employers*

Mutual Liability Insurance Co. v. Eunice Rice Milling Co., supra, this Court has recently denied a petition for certiorari to review the issues here involved.

JURISDICTION OF THE SUPREME COURT

Jurisdiction of this Court is invoked on appeal under the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 928; 28 U. S. C. 1254 (2). The judgment of the Court of Appeals was rendered on February 27, 1953 (R. 45) and the petition for appeal was filed March 7, 1953 (R. 46). No petition for certiorari has ever been filed in this action. Appellee filed a timely motion to dismiss or affirm and the question of the jurisdiction of this Court on appeal, by order dated May 3, 1954 (R. 51), was postponed to the hearing of the case on the merits. Under the provisions of Rule 16 (4) of this Court, the question of jurisdiction will first be discussed. In order that this question may be fully presented, a statement of the case and history of the statutes involved must first be set forth.[1]

THE CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

In addition to the constitutional provisions referred to on pages 2 and 3 of appellants' brief, this case involves the McCarran Act, Act of March 9, 1945, c. 20, Sec. 1, 59 Stat. 33, 15 U. S. C. 1011-1015, and as amended by the Act of July 25, 1947, c. 326, 61 Stat. 448, 15 U. S. C. 1013

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1. Appellee has filed a separate Motion to Dismiss for Lack of Certiorari Jurisdiction, which sets forth the authorities in support thereof and therefore will not be discussed in this brief.

(hereinafter quoted in part), and the following Louisiana Statutes quoted consecutively as exhibits A through G in the appendix of this brief:

Act 253 of 1918, Acts of Louisiana, Regular Session of 1918, p. 461;

Act 55 of 1930, Acts of Louisiana, Regular Session of 1930, p. 122;

Act 211 of 1946, Acts of Louisiana, Regular Session of 1946, p. 640;

Act 195 of 1948, Acts of Louisiana, Regular Session of 1948, Vol. II, p. 141;

Section 655 of Title 22 of Louisiana Revised Statutes, West's L. S. A. Revised Statutes, Vol. 15, p. 565;

Section 983 of Title 22 of Louisiana Revised Statutes, West's L. S. A. Revised Statutes, Vol. 15, p. page 761;

Act 541 of 1950, Acts of Louisiana, Regular Session of 1950, p. 985;

Act 542 of 1950, Acts of Louisiana, Regular Session of 1950, p. 986.

STATEMENT OF THE CASE

Although appellants' statement of the case is essentially correct, they have omitted or misstated certain essential facts. For the purpose of clarifying these matters, appellee now sets out its own statement of the case.

Appellants, citizens of Louisiana, instituted this tort action on April 5, 1952, seeking the recovery of dam-

ages by reason of the alleged injurious effect of using the product known as "Toni Home Permanent", which was purchased at a retail store in Arcadia, Louisiana. This product was manufactured by the Gillette Company of Boston, Massachusetts, and its wholly owned subsidiary, The Toni Company, of Chicago, Illinois. The product, "Toni Home Permanent", was sold by the Gillette Company and its subsidiary throughout the United States, its territories, Canada and Newfoundland, including retail stores in the State of Louisiana, but neither that Company nor its subsidiary were qualified to transact business in the State of Louisiana, nor did they have an agent for serivce of process there.[2]

Employers Liability Assurance Corporation, Ltd., appellee, which is a corporation organized under the laws of Great Britain, and has qualified to transact business in the States of Massachusetts, Illinois and Louisiana, is the product's liability insurer of the manufacturer of "Toni Home Permanent", and, as such, it issued and delivered the policy sued on. This insurance contract, an admittedly true copy of which is in the Record at pages 53-67, was executed and issued to the insured, the Toni Company and the Gillette Company, by no Louisiana office of appellee. Admittedly, it was actually applied for and was executed and issued from appellee's office located in Boston, Massachusetts, and was delivered to the Toni Company in Chicago, Illinois. Effective July 1, 1951, to

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2. See Paragraph 2 of the supplemental and amended complaint (R. 8) and affidavits of Sheldon Flynn (R. 29-31), and Boone Gross (R. 27-29).

July 1, 1952, the insurance policy is a renewal of the policy sued upon in the companion case, *Bish v. Employers Liability Assurance Corporation, Ltd.*, supra,[3] which was effective July 1, 1950, to July 1, 1951.

It is admitted by appellants that, at and from the time of the issuance and delivery of the insurance contract until now, Massachusetts and Illinois had, and have, no statute or law prohibiting or invalidating any of the conditions or limitations found in the contract sued upon. The policy of insurance contains a clause designated as "Action against Company", appearing on page 57 of the Record as No. 12 of the conditions of the policy.[4] This clause, which will hereafter be referred to as the "no action clause", prohibits suit against the insurer until final judgment shall have been rendered against the in-

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3. See Footnote 3 in the opinion of the Court of Appeals (R. 39).

4. **"No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.**

"Any person or organization or the legal representative thereof who has secured judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. **Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability."**

(Italics and emphasis in quotations here and throughout this brief are supplied by appellee unless otherwise specified.)

sured. Admittedly, the clause is valid and enforceable in the States of Massachusetts and Illinois. A direct action against the insurer, prior to the determination of the insured's obligation by judgment or written agreement, is prohibited. Admittedly, appellants have not previously brought suit against the Gillette Company or the Toni Company, and the amount of the insured's obligation if any has not been fixed by judgment or by written agreement.

Appellants' statement, on page 2 of their brief, that the policy extended coverage in Louisiana, is misleading. Clause IV of the Insuring Agreements in the policy (R. 56) provides:

> "This policy applies only to accidents which occur during the policy period within the United States of America, its territories or possessions, Canada or Newfoundland. • • • "

The Gillette Company and appellee, the insurer, specifically contracted with reference to Massachusetts laws. Paragraph 18 of the Conditions in the policy (R. 67) provides:

> "Terms of this policy which are in conflict with the statutes of the state wherein this policy is *issued* are hereby amended to conform to such statutues."

This action was originally brought against appellee, the insurer, as the sole defendant, without complying with and indeed in direct disregard of the valid conditions in the policy above set out. Originally filed in a State court of Louisiana, the action was removed by appellee to the

District Court of the United States for the Western District of Louisiana, which had recently considered and decided identical issues in the *Bish* case, supra. Appellee moved to dismiss the action, contending that the Louisiana Direct Action Statute, relied upon by appellants, did not apply to the facts of this case, or, if applicable, would violate appellee's constitutional rights.[5] Appellants filed supplemental and amended complaints, seeking to join the Gillette Company as an additional defendant (R. 8-9, 16-18). On September 12, 1952, the District Judge rendered an opinion, dismissing the entire case as to all defendants (R. 32-35). Judgment was signed in accordance with the opinion, dismissing the suit as to all defendants and decreeing "that Acts 541 and 542 of the Louisiana Legislative session of 1950, *insofar as they apply to an insurance company issuing and delivering a policy of public liability insurance outside the State of Louisiana*, are unconstitutional, null and void" (R. 35-36). On September 25, 1952, appellants appealed to the United States Court of Appeals, Fifth Circuit, not only from the judgment rendered in favor of the insurer, but also from the judgment in favor of the Gillette Company (R. 36). Accordingly, both the insurer and the Gillette Company were parties of record in the court below. The Circuit Court rendered an opinion affirming the judgment of the District Court (R. 39), and judgment in accordance therewith was entered, dismissing the action as to both defendants (R. 45). Appellants have not abandoned their claims against the Gillette Company.

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5. See appellee's extended motion to dismiss and plea of unconstitutionality (R. 11-14).

HISTORY OF THE LOUISIANA DIRECT ACTION STATUTE IN RELATION TO THE McCARRAN ACT

Prior to 1918, it was clearly recognized in Louisiana that the injured person was a stranger to a contract of liability insurance and had no rights under the policy. Because he was not in privity of contract with the insurer, he could not reach the proceeds of the policy for the payment of his claim by an action directly against the insurer. The insurer was at liberty to settle with and pay its insured any amount they might in good faith agree upon and money paid the insured was not impressed with any trust for the benefit of the injured person; the insured could use such sum as he saw fit.

Act 253 of 1918 of the Louisiana Statutes (Appendix "A" of this brief) provided that in case of insolvency or bankruptcy of the assured, "an action may be maintained *within the terms and limits of the policy* by the injured person or his or her heirs, against the insurer company." Louisiana courts construed the statute to mean that the cause of action "within the terms and limits of the policy" was conditioned upon the injured person's obtaining a judgment against the assured and upon unsuccessful efforts to collect the judgment.*

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6. In 1929, in **Edwards v. Fidelity & Casualty Co. of New York**, 11 La. App. 176, 123 So. 162, the Court said: "Of course, the right to present and enforce this cause of action is conditioned **upon the obtaining of a judgment against the party at fault** and upon unsuccessful efforts to collect that judgment, but these are conditions with which it is within the power of the injured party to comply. If he cannot comply with them, he has only himself to blame."

Act 55 of 1930 of the Louisiana Statutes (Appendix "B" of this brief) was the first statute which provided for a direct action by the injured person against the insurer.[7] That statute amended and reenacted the 1918 Act to provide that "any *judgment* which may be rendered, against the assured, for which the insurer is liable, which shall have become executory, shall be deemed prima facie evidence of the insolvency of the assured, and an action may *thereafter* be maintained *within the terms and limits of the policy* by the injured person or his or her heirs against the insurer company". It further provided that "the injured person or his or her heirs, at their option, shall have a right of direct action against the insurer company (alone) *within the terms and limits of the policy.* * * * * * It being the intent of this Act that any action brought hereunder *shall be subject to all of the lawful conditions of the policy contract and defenses which could be urged by the insurer to a direct action brought by the insured.* * * *"

Although the wording of Act 55 of 1930 indicated that the Legislature still intended that the cause of action should be conditioned upon the injured person's obtaining a judgment against the assured, the Louisiana courts disregarded the construction which they had previously plac-

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7. In **Burke v. Massachusetts Bonding & Ins. Co.**, 209 La. 495, 24 So. 2d 875, the Louisiana Supreme Court said: "It is admitted that prior to Act 55 of 1930, a claimant could not maintain a direct action against the assurer but **had to first sue the assured, obtain judgment, and exhaust his remedies prior to bringing his action against the assurer**; such was our law and is now the law of Mississippi."

ed upon the words "within the terms and limits of the policy," and held that the Legislature had created a cause of action in favor of injured persons, which inured to their benefit upon the happening of an accident. It allowed them to institute a direct action at law to recover damages from the insurance company as the sole defendant, despite clear provisions in the insurance contract to the contrary.[8]

The first clause of Act 55 of 1930 provided that "It shall be illegal for any company to issue any policy against liability" except subject to the provisions of the Act, and it would appear that this language would restrict the application of the Act to policies of liability insurance issued in Louisiana. The courts, however, rendered conflicting opinions as to the extraterritorial effect of the statute.[9]

In 1944 this Court, in *United States v. South-Eastern Underwriters Asso.*, 322 U. S. 533, 88 L. Ed. 1440, 64 S.

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8. In **Miller v. Commercial Standard Ins. Co.**, 6 So. 2d 646, 199 La. 575, the Louisiana Supreme Court said:

"Act 55 of 1930 granted to persons injured or damaged by a motor vehicle covered in insurance against liability **a privilege which they did not theretofore have.** It gave them a 'right of direct action against the insurer company alone', to recover such damages as they may have sustained by the fault of the insured."

9. In **Lowery v. Zorn**, 157 So. 826, and **Wheat v. White**, 35 F. Supp. 796, it was held that Act 55 of 1930 could not be applied to policies issued and delivered out of Louisiana.

In **Burke v. Massachusetts Bonding & Ins. Co.**, 19 So. 2d 647, 651, affirmed supra Note 7, it was held that Act 55 of 1930 could not be applied if the accident or injury occurred out of Louisiana.

Ct. 1162, decided that the business of insurance involves interstate commerce. To counteract any adverse effect that this decision might be found to have on State regulation of insurance, Congress enacted the McCarran Act, Act of March 9, 1945, c. 20, Sec. 1, 59 Stat. 33, 15 U.S.C., Sec. 1011-1015, providing in part that the business of insurance "shall be subject to the laws of the *several* states which relate to the regulation or taxation of such business". The House Report on the bill as enacted is decisive of the issues presented in this case:

> "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, *subject, always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in Allgeyer v. Louisiana (165 U. S. 578), St. Louis Cotton Compress Co. v. Arkansas (260 U. S. 346), and Connecticut General Insurance Co. v. Johnson (303 U. S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.*" HR Rep No 143, 79th Cong. 1st Sess 3.

In view of this unequivocal expression of congressional meaning, it is evident that Louisiana had (and

now has) no power to regulate in any way contracts of insurance entered into outside its jurisdiction, even if such contracts were entered into by Louisiana citizens or covered risks within the State. The same limitations applied (and now apply) to every other State.

By the Act of July 25, 1947, c. 326, 61 Stat. 448, 15 U.S. C. 1013, Congress suspended the operation of the Sherman and Clayton Acts with reference to insurance and allowed each State until June 30, 1948, to specify the manner in which it would regulate the business of insurance.

By Act 211 of 1946 of the Louisiana Statutes (Appendix "C" of this brief), the Louisiana Legislature, specifically recognizing the suspension of the federal statutes dealing with interstate commerce and the provisions of the McCarran Act, authorized and directed the Secretary of State of Louisiana to draft a comprehensive Insurance Code, to obtain "clarity of purpose" in the laws pertaining to insurance, to be presented to the 1948 session of the Legislature.

The Louisiana Insurance Code was adopted and enacted as Act 195 of 1948 of the Louisiana Statutes. Section 1.02 of that statute declared that "it is the purpose of this Code to regulate that business (insurance) in all its phases". Section 32.01 of the Code specifically repealed Act 253 of 1918 and Act 55 of 1930. Section 14.45 (Appendix "D" of this brief) replaced the previous Direct Action Statute and contained essentially the same provisions as Act 55 of 1930, with the exception that the first clause of the Act provided as follows:

"No policy or contract of liability insurance shall be *issued or delivered in this State.* * * *."

The courts promptly held that, in view of this clear expression of legislative intent, the application of the Direct Action Statute was limited to policies issued or delivered in Louisiana.[10]

Effective May 1, 1950, all Louisiana statutes were codified and the Direct Action Statute was re-enacted as Section 655 of Title 22 of the Louisiana Revised Statutes of 1950 (Appendix "E" of this brief), Act 2 of the Extra Session of 1950 of Louisiana Statutes. Section 655 of Title 22 repeated *verbatim* the provisions of Section 14.45 of Act 195 of 1948, including the first clause limiting the application of the act to policies of liability insurance "issued or delivered in Louisiana".

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10. In **Belanger v. Great American Indemnity Co.**, 89 F. Supp. 736, the Court said:

> "**** The intention of the legislature to limit Section 14.45, under which the right of direct action against liability insurers is now provided, to policies of insurance issued in Louisiana is manifested by the first clause of the act which reads as follows: 'No policy or contract of liability insurance shall be issued or delivered in this State,***.' By this language it is apparent that the legislature, rather than risk the possibility of Section 14.45 being declared unconstitutional as applied to out of state liability policies, specifically limited its application to policies issued in Louisiana. Under this section therefore, if the expressed intent of the legislature is to be given effect, the direct action provision does not apply to policies of liability insurance issued in states other than Louisiana. It will follow, therefore, that Section 14.45 does not apply to the policy of insurance here in suit since it was admittedly issued in Massachusetts."

Effective July 26, 1950, Act 541 of 1950 of the Louisiana Statutes (Appendix "F" of this brief) amended and *re-enacted* Section 655 of Title 22 of the Revised Statutes of 1950, again repeating *verbatim* the provisions of Section 14.45 of Act 195 of 1948, including the first clause quoted above, but adding the following provision in the body of the Act:

> "This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana.

Act 542 of 1950 of the Louisiana Statutes (Appendix "G" of this brief) amended Section 983 of Title 22 of the Revised Statutes of 1950 (providing requisites for the issuance of a certificate to do business in Louisiana to a foreign insurer) to include a new subsection requiring the foreign insurer to consent to being sued in a direct action as provided in Section 655 of Title 22.

THE ADMITTEDLY VALID NO ACTION CLAUSE

Appellants' claim to damages cannot relate in the remotest manner to appellee except by reason of the existence of the insurance contract it issued the Gillette Company in Massachusetts. Being a Massachusetts contract, the law of that state entered into it. The only obligation assumed by appellee in the contract sued upon was the one to indemnify its insured, the Gillette Company, against loss arising by its own negligence. The contract

of insurance was issued for the protection of the insured; it was not designed for the protection of strangers."[11] The existence of the injured person was unknown to the contracting parties. The contract contains an admittedly valid no action clause, hereinabove quoted, which simply provides that no action may be maintained against the insurer until the extent of the insured's loss is fixed by final judgment or by written agreement.

Appellants admit that the no action clause is valid as between the parties to the contract. At the present time, even in Louisiana, a suit on the contract by the insured, the Gillette Company, against appellee could not be maintained, because admittedly no suit has previously been brought against the insured and the amount of the insured's obligation, if any, has not been fixed, either by judgment or by written agreement. An action on the contract admittedly cannot be maintained at the present time.

Appellants assert on pages 3 and 13 of their brief that this is not an action on the contract but is actually a *tort* action. On page 19 of their brief, they state that the insurer can defend the action by pleading that the Gillette Company was free from negligence or that ap-

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11. In **Cushing v. Maryland Casualty Company**, 347 U. S. 409, 74 S. Ct. 608, 98 L. Ed. (Advance, page 519, 530), this Court considered a policy of public liability insurance issued in Louisiana to a ship owner, containing a no action clause similar to that in the present case and said:

"The owner's motive in purchasing insurance certainly was not to protect his seamen or the public, but to protect himself against damage claims."

pellants were contributorily negligent in a "full, searching trial where both sides introduce their evidence and assert their legal contentions, which are resolved by the court or jury,[12] as the case may be". In other words, appellants contend that they are entitled to try their negligence action before a jury with the insurer of the alleged tort feasor as the sole defendant. Under the express provisions of the valid no action clause and under the laws of Massachusetts, which are part of the contract, appellee cannot legally be put to a defense of appellants' action at this time.

The no action clause is placed in a policy of liability insurance to assist the insurer in avoiding prejudice, questionable liability, and excessive jury verdicts.

In 4 A. L. R. (2d) 761-825, at page 767, an annotation, supported by cases from forty-four of the states, shows that the general rule in the United States is that, in a personal injury action, evidence that the defendant carries insurance protecting him from liability to third persons on account of his negligence is inadmissible. Such evidence is not only inadmissible because it ordinarily is irrelevant as to any of the issues in the case, but because it tends to influence jurors to bring in verdicts against defendants on insufficient evidence and to bring in verdicts for more than they would if they believed that the defendants themselves would be required to pay them. It is well recognized that the usual purpose for which evi-

12. In paragraph 21 of the complaint (R. 15), appellants assert that they are entitled to trial by jury.

dence of this character is presented is to prejudice the jury and obscure the real issues in the case. Juries are notoriously more free with the funds of insurance companies than they are with the funds of ordinary defendants. In the forty-four states referred to, including Massachusetts and Illinois,[13] evidence concerning the defendant's insurance must be scrupulously kept from the jury. Where such evidence is once injected into the minds of the jury by argument of counsel, or otherwise, the prejudice is sufficient to cause the court to declare a mistrial. Such evidence is recognized, on appeal, as grounds for reversible error.

The court, in *James Stewart & Co. v. Newby*, (C. C.A. 2d), 266 F. 287, said:

> "This court must take cognizance of the general recognition among the members of the bar, as well as by the courts, of the harmful effect upon the minds of jurors of such testimony as was here sought to be introduced. The only purpose for which such evidence is presented is to prejudice the jury, and the poison is of such character that, once being injected into the mind, it is difficult of eradication. * * * * * * The anecdote of a final instruction to disregard the testimony is ineffective. The removal of the fly does not restore an appetite for the food into which it has fallen . . . Verdicts cannot be relieved of the danger of criticism as long as there is a basis for the opinion that they have been rendered through the influence of prejudice."

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13. See the cases from Illinois and Massachusetts cited in 4 A. L. R. (2d) on pages 768 and 769. Further Massachusetts authorities are c[illegible] **Jennings v. Beach**, 1 F. R. D. 442.

In *Brown v. Walter* (CCA 2d) 62 F. 2d 798, 800, Circuit Judge Learned Hand, speaking for the court, said:

> "There can be no rational excuse, except the *flimsy* one that a man is more likely to be careless if insured. That is at most the merest guess, much more than outweighed by the probability that the real issues will be obscured.'[14] In the case at bar, save for the cross-examination of the doctor, there was no excuse for even an intimation that the defendant was insured; if that witness is not called upon the next trial, there will be none whatever, and unless the insurance is scrupulously kept from the jury, a mistrial should be declared. The prevalent knowledge that in such cases insurance is usually taken is a hard enough handicap at best; it is difficult in any event to get a decision on the real issues."

The Legislature of Michigan, recognizing the prejudicial effect of knowledge of defendant's insurance upon the jury, enacted Act No. 154, Public Acts of 1929, which is the exact opposite of the Louisiana Direct Action Statute, and provided in Section 33 thereof (Comp. Laws Mich. 1929, Sec. 12460) the following:

> "In such original action, such insurance company, or other insurer, shall not be made, or joined as a party defendant, nor shall any reference whatever

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14. It will be noted that here Judge Hand did not agree with the reasoning of this Court in **Merchants Mut. Auto. Liability Ins. Co. v. Smart**, 267 U.S. 126, 129, 69 L. Ed. 538, 542, 45 S Ct. 320, wherein it had in mind "the sense of immunity of the owner protected by insurance and the possible danger of a less degree of care due to that immunity."

be made to such an insurance company, or other insurer, or to the question of carrying of such insurance during the course of trial."

The no action clause allows the insurer the benefit of the assured's standing in the community. It also assists the insurer in getting the insured's cooperation. In *Belanger v. Great American Indemnity Co.*, supra (89 F. Supp at page 740), the Court said:

"In a direct action suit against the insurer, the insured is likely to be less interested, less available and less cooperative, particularly when the relationship between the plaintiff and the insured is cordial."

In the final analysis, the no action clause requiring that judgment first be obtained against the assured, is recognized as a reasonable condition precedent in a policy of liability insurance whereby the insurer determines the establishment and amount of its liability under the contract. In *Lorando v. Gethro*, 228 Mass. 131, 117 N. E. 185, 1 A. L. R. 1374, the Massachusetts Supreme Judicial Court, through Chief Justice Rugg, recognized that the injured person could have no rights against the insurer until he had recovered a judgment against the insured, and said:

"It is almost inconceivable that the legislature would attempt to make an insurance company unconditionally liable to pay for a loss without giving it an opportunity to . . . . make reasonable conditions as to the establishment of its liability under the insurance contract. * * * A statute of such import

would present a constitutional question quite different from those now at bar."

From the insured's point of view, the no action clause assures that the original negligence action will be filed at the insured's domicile, where it can profit by the good will it has built up in the community and where its expert witnesses are available. In this case, it is alleged that the insured's product was defectively manufactured, an issue which the Gillette Company and the Toni Company deny and are obviously interested in defending. Defense of the issue would require the testimony of the Toni Company's engineers and technicians, readily available at its domicile but who could not be sent throughout the territory covered by the insurance policy without great hardship and inconvenience to the manufacturer. Although the products of these companies are shipped in interstate commerce for sale throughout the United States, its territories, Canada and Newfoundland, that does not render them amenable to suits outside the states of their domicile. Admittedly, they have not qualified to do business in Louisiana and have no agent for service of process there. By purchasing insurance in Massachusetts, they did not intend to subject their products to attack by suits filed in Louisiana against the insurer. The valid no action clause affords that protection.

In addition, the Gillette Company and the Toni Company have a definite interest in holding judgments rendered in favor of injured parties to a minimum. In the policy of liability insurance sued upon herein, the insureds have contracted to pay appellee a "cost-plus"

premium, the details of which are outlined in the endorsement to the policy appearing on pages 63-66 of the Record. It will be noted that this arrangement, unlike that found in many liability policies, contemplates a computation of the premium at six-month intervals throughout the life of the contract, the premium being based upon a defined percentage of the total "incurred losses", being in substance the amounts paid in settlement of claims and judgments by the insurer. The greater the incurred losses, the greater the premium the insureds are obligated to pay. Accordingly, with the insurer, they have a decided interest in avoiding prejudice, questionable liability and excessive jury verdicts.[15]

JURISDICTIONAL QUESTION

APPELLEE'S MOTION TO DISMISS THE APPEAL FOR WANT OF JURISDICTION SHOULD BE SUSTAINED BECAUSE THE DECISION OF THE COURT OF APPEALS DID NOT INVALIDATE THE LOUISIANA DIRECT ACTION STATUTE. THE COURT BELOW APPLIED ADMITTEDLY VALID MASSACHUSETTS AND ILLINOIS STATUTES AND JURISPRUDENCE. ***Bradford Electric Light Co. v. Clapper, 284 U. S. 221, 76 L. Ed. 254, 52 S. Ct. 118; Knop v. Monogahela River Consol. Coal & Coke Co., 211 U. S. 485,53 L. Ed. 294, 29 S. Ct. 188; Public Service Comm. of Indiana v. Batesville Telegraph Co., 284 U. S. 6, 76 L. Ed. 135, 52 S. Ct. 1; Baxter v. Continental Cas. Co., 284 U. S. 578, 76 L. Ed 502, 52 S Ct. 2.***

The Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. 1254 (2) provides that cases in the Courts of Appeals may be reviewed by this Court "by appeal by

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15. The "sense of immunity" of the insured, referred to in **Merchants Mut Auto. Liability Ins. Co. v. Smart**, supra, Footnote 14, is not present here.

a party relying on a state statute held by a Court of Appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States". Appellee admits that the Louisiana Direct Action Statute, if applied to policies of liability insurance issued or delivered in Louisiana, is valid. The Court of Appeals, Fifth Circuit, has repeatedly recognized the validity of this statute when applied to the Louisiana policies issued by insurance companies.[16] The courts below, in this case and the series of seven companion cases referred to at the outset of this brief, merely held that the Louisiana statute, although valid in its proper field, cannot be applied to a policy of liability insurance issued and delivered outside the State of Louisiana and containing a no action clause, admittedly valid in the states where the policy was issued and delivered. Although this action was filed in Louisiana, the Court of Appeals upheld the validity of the statutes and jurisprudence of Massachusetts and Illinois, where the contract herein sued upon was issued and delivered and where, admittedly, a direct action under the facts of this case is not allowed and the no action clause is valid. The court below, while recognizing the validity of the Louisiana statute as applied to Louisiana policies of lia-

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16. See **Elbert v. Lumbermen's Mutual Casualty Co.**, 107 F. Supp. 299, 201 F. 2d 500, rehearing denied, 202 F. 2d 744; Certiorari granted, 98 L. Ed. (Advance, p. 607) presently pending for argument under No. 11 of the October, 1954, Term of this Court; **Cushing v. Maryland Casualty Co.**, 198 F. 2d 536, rehearing denied, 198 F. 2d 1021, Certiorari granted; 345 U. S. 902, 73 S. Ct. 642, 97 L. Ed. 1339, remanded 347 U. S. 409, 74 S. Ct. 608, 98 L. Ed. (Advance, page 519); **Weingartner v. Fidelity Mutual Ins. Co. of Indianapolis**, 205 F. 2d 833.

bility insurance, held that the statute could not be given extra territorial effect or deprive appellee of a defense under the applicable laws of other states, as under the circumstances here presented.

In *Bradford Electric Light Co. v. Clapper*, supra, an action for damages was filed in New Hampshire on a Vermont contract of employment. Although permitted by the New Hampshire statute, the action was barred by the provisions of the Vermont Act, which precluded recovery by proceedings brought in another state for injuries received in the course of employment.[17] The Circuit Court of Appeals held that the action could be maintained because the statute of Vermont could have no extra territorial effect. The defendant appealed and this Court dismissed the appeal for want of jurisdiction. This Court, 284 U. S. 221, 222, 223, 76 L. Ed. 254, 255, 52 S. Ct. 118, said:

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17. The **Bradford Electric Light Co. v. Clapper** case supra, was subsequently reviewed by this Court **on certiorari** and the provisions of the Vermont Act were outlined, 286 U. S. 145, 153, 76 L. Ed. 1026, 1031, 52 S. Ct. 571, as follows:

"It clearly was the purpose of the Vermont Act to preclude any recovery by proceedings brought in another state for injuries received in the course of a Vermont employment. The provisions of the Act leave no room for construction. The statute declares in terms that when a workman is hired within the State, he shall be entitled to compensation thereunder for injuries received **outside, as well as inside, the State**, unless one of the parties elects to reject the provisions of the Act. And it declares further that **for injuries wherever received the remedy under the statute shall exclude all other rights and remedies** of the employee or his personal representatives."

> "As the decision of the Circuit Court of Appeals was not against the validity of the statute of Vermont, the appeal to this court must be dismissed for the want of jurisdiction."

In the present case, the action was filed in Louisiana on a Massachusetts contract. Although permitted by the Louisiana statute, the action admittedly is barred in Massachusetts. The Court of Appeals below held that the action cannot be maintained because the Louisiana statute cannot have extra territorial effect under the circumstances. Since the decision of the Court of Appeals is not against the validity of the statute of Louisiana, the appeal to this Court must be dismissed for want of jurisdiction.

Appellants contend that the Court below held that the Louisiana statute is unconstitutional because it stated, in its opinion, that "*if* the statute *is construed* as extending to and invalidating the 'no action' provision of a policy written and delivered, as this one was, outside of the state, the statute represents an attempt to give extra territorial effect to Louisiana laws and to subject to them the doing of business, and the business done, in other states. *So construed*, we are in no doubt that . . . it violates the defendant's constitutional rights". (R. 42). It is the contention of appellee that the Court of Appeals, in making this statement, actually construed the Louisiana statute to uphold its validity, not to invalidate it. It refused to give the statute a construction whereby it would have extra territorial effect and thereby violate appellee's constitutional rights. It is well settled that the mere con-

struction of a state statute does not of itself present a Federal question or permit a direct appeal from a Court of Appeals to this Court. *Knop v. Monongahela River Consol. Coal & Coke Co.*, supra.

Appellee, in its motion to dismiss, contended that the Louisiana statutes, under which this proceeding was brought, "*do not apply under the facts of this case*, or *if* applicable, violate the provisions of the Federal and Louisiana Constitutions * * *". (R. 11-14). The Court below merely upheld appellee's contention that the Louisiana Direct Action Statute is inapplicable under the circumstances of this case. Section 1254 (2) allows an appeal to this Court in only one instance: Where the Court of Appeals holds a state statute invalid. A mere *application* of state law is insufficient. *Public Service Comm. of Indiana v. Batesville Telegraph Co.*, supra; *Baxter v. Continental Cas. Co.*, supra.

The cases referred to in appellants' brief are not relevant to the facts presented here. The case of *Dahnke-Walker Co. v. Bondurant*, cited on page 16 of appellants' brief, discusses the right of review by writ of error, a remedy which has been abolished since the opinion was rendered. The case of *Furst v. Brewster*, cited on the same page, deals with the right of appeal from a judgment of a State Supreme Court and is inapplicable here.

Appellants contend that the decision of the Court of Appeals invalidated a provision inserted in the Direct Action Statute by Act 541 of 1950, and, accordingly, the Court necessarily held that the statute was unconstitutional. Appellee shall now show that this contention is not sound.

THE INVALIDITY OF AN EXCEPTION OR PROVISO, INSERTED IN THE BODY OF AN ORIGINAL ACT AND REENACTED BY AN AMENDING ACT, DOES NOT MAKE THE ORIGINAL ACT INVALID, WHERE THE TWO ACTS WERE ENACTED BY DIFFERENT LEGISLATURES. THE UNCONSTITUTIONAL PROVISO UNDER SUCH CIRCUMSTANCES IS IN REALITY NO LAW AND IN LEGAL CONTEMPLATION IS AS INOPERATIVE AS IF IT HAD NEVER BEEN PASSED. ***Frost v. Corporation Commission, 278 U. S. 515, 528; 73 L. Ed. 483, 491; 49 S. Ct. 235; Eberle v. Michigan, 232 U. S. 700, 705; 58 L. Ed. 803, 805; 34 S. Ct. 464; Reitz v. Mealey, 314 U. S. 33, 39; 86 L. Ed. 21, 25-26; 62 S. Ct. 24; Traux v. Corrigan, 257 U. S. 312; 66 L. Ed. 254; 42 S. Ct. 124; Davis v. Wallace, 257 U. S. 478, 66 L. Ed. 325; 42 S. Ct. 164; City of New Orleans v. Levy, 223 La. 14; 64 So. 2d 798, 802 (1953).***

Following the passage of the McCarran Act, as hereinabove pointed out in the History of the Direct Action Statute, the Louisiana Legislature provided specifically that the direct action statute should apply only to policies of liability insurance "issued or delivered in this State." Thereafter, a subsequent Legislature *reenacted* the direct action statute in full, adding a proviso in the body of the Act that the right of direct action should exist "whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contained a provision forbidding such direct action".

It is well settled that an unconstitutional proviso, enacted by a subsequent legislature, is no law and the validity of the reenacted statute is not affected thereby. In *Frost v. Corporation Commission*, supra, this Court said:

"Here it is conceded that the statute, before the amendment, was entirely valid. When passed, it expressed the will of the legislature which enacted it. Without an express repeal, a different legislature undertook to create an exception, but, since that body sought to express its will by an amendment which, being unconstitutional, *is a nullity and, therefore, powerless to work any change in the existing statute*, that statute must stand as the only valid expression of the legislative intent.

"* * * The question is not affected by the fact that *the amendment was accomplished by inserting the proviso in the body of the original section and reenacting the whole at length.*

"But here the proviso under attack, having been adopted by a subsequent act and being invalid, had no effect, as we have already said upon the provisions of the statute. As applied to this case, *it began and ended as a futile attempt by the legislature to bring about a change in the law which a previous legislature had enacted. For this purpose, and as construed, and applied below, it was a nullity, wholly 'without force or vitality', leaving the provisions of the existing statute unchanged.*"

In *Eberle v Michigan*, supra, this Court said:

"In the case at bar the original local option law of 1889 had been held to be constitutional as a whole, and its validity could not be impaired by the subsequent adoption of what were in form amendments, but, *in legal effect, were mere nullities.*"

See also *Reitz v. Mealy*, supra; *Traux v. Corrigan*, supra; and *Davis v. Wallace*, supra.

In *City of New Orleans v. Levy*, supra, the Louisiana Supreme Court said:

> "This court and the courts of other jurisdictions have uniformly held that an unconstitutional exception which would have invalidated a statute or ordinance had it been contained therein originally does not have the same effect *when added by an amendment years later*, notwithstanding that on the adoption of the amendment the original legislation is *reenacted at length. The unconstitutional amending statute or ordinance is in reality no law, and in legal contemplation is as inoperative as if it had never been passed.*"

The judgment of the District Court below dismissed the case as to all defendants and also declared the reenacted statute unconstitutional *only insofar as it applied to an insurance company issuing and delivering a policy of public liability insurance outside the State of Louisiana* (R 35-36). The judgment of the Court of Appeals below merely affirmed the judgment of dismissal (R. 45). If it be considered that the Court of Appeals did hold that the proviso, added by subsequent legislation, was invalid, that still would not affect the validity of the original Louisiana direct action statute. The unconstitutional proviso under the circumstances was no law and, in legal effect, a mere nullity.

THE CASE SHOULD NOT BE REVIEWED ON APPEAL IN FRAGMENTS OR PIECEMEAL. *Metropolitan Trust Co. of City of New York, in re, 218 U. S. 312, 320, 54 L. Ed. 1051, 1054, 31 S. Ct. 18; Wilson v. Kiesel, 164 U. S. 248, 251, 41 L. Ed. 422, 423, 17 S. Ct. 124; Hartford Accident & Indemnity Co. v. Bunn, 285 U. S. 169, 76 L. Ed. 685, 52 S. Ct. 354; Collins v. Miller, 252 U. S. 364, 64 L Ed 616, 40 S. Ct. 347; Arnold v. United States, 263 U. S. 427, 68 L. Ed. 371, 44 S. Ct. 144; Martinez v. International Banking Corp., 220 U. S. 214, 55 L. Ed. 438, 31 S. Ct. 408.*

The Gillette Company was a party of record in the Court of Appeals and the judgment of that Court, dismissing this case as to *all* defendants, was in its favor as well as in favor of appellee, Gillette's insurer. (R. 45 affirming judgment of the District Court, R. 35, 36). On page 5 of their brief, appellants state that "Mrs. Ruth S. Watson suffered severe personal injuries as the result of the use of a patented hair waving product, known as a 'Toni Home Permanent', a product manufactured by Gillette . . . due to harmful ingredients therein". Appellants state that this is a tort action and their cause of action admittedly is based upon the asserted negligence, if any, of the Gillette Company. Obviously the Gillette Company, which desires to defend this attack upon its product and which is insured under a contract providing for a "cost-plus" premium, is directly and vitally interested in maintaining the judgment appealed from, not only insofar as the judgment below is in its favor, but also is in favor of its insurer. It is well settled that a case should not be brought up by appeal in fragments or piecemeal. *Metro-*

politan Trust Co. of City of New York, In Re, supra; *Wilson v. Kiesel*, supra; *Hartford Accident & Indemnity Co. v. Bunn*, supra; *Collins v. Miller*, supra; *Arnold v. United States*, supra, and *Martinez v. International Banking Corp.*, supra.

CONCLUSION OF ARGUMENT ON JURISDICTIONAL QUESTION

The Court of Appeals did not hold that the Louisiana direct action statute is invalid but sustained the validity of Massachusetts and Illinois statutes and decisions which apply under the circumstances of this case. The Court below merely stated that a proviso, added to the Louisiana statute by a subsequent legislature, if *construed* to be applicable to the facts of this case, would deprive appellee of its constitutional rights. That statement does not support a direct appeal from a Court of Appeals to this Court. In the alternative, if it be considered that the Court of Appeals held that the proviso in the Louisiana Act is unconstitutional, the situation is not altered because, under the circumstances, the proviso was a mere nullity and the validity of the State statute itself is not affected. The Gillette Company, in whose favor the judgment below was also rendered, is an interested party to this appeal and the case should not be considered on appeal in fragments. Appellee's motion to dismiss the appeal should be sustained.

QUESTIONS PRESENTED FOR REVIEW ON THE MERITS

Does Louisiana have the right to invalidate a provision of a contract executed in Massachusetts and to be performed in Massachusetts and Illinois, which provision is admittedly valid in those states? Has Louisiana taken hold of a matter within her power, or has she reached beyond her borders to regulate a subject which is none of her concern because the Constitution and Congress have placed control elsewhere? [18]

ARGUMENT ON THE MERITS

ALTHOUGH A STATE MAY REGULATE THE ACTIVITIES OF FOREIGN CORPORATIONS WITHIN THE STATE, SHE CANNOT REGULATE OR INTERFERE WITH WHAT THEY DO OUTSIDE. A STATE CANNOT REGULATE OR INVALIDATE PROVISIONS IN AN INSURANCE CONTRACT VALIDLY MADE OUTSIDE HER BORDERS. ***Allgeyer v. State of Louisiana, 165 U. S. 578, 41 L. Ed. 832, 17 S. Ct. 427; St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 67 L. Ed. 297, 43 S. Ct. 125; Connecticut Gen. Life Ins. Co. v. Johnson, 303 U S. 77, 82 L. Ed. 673, 58 S. Ct. 436; The McCarran Act; Prudential Ins. Co. v. Benjamin, 328 U. S. 408, 90 L. Ed. 1342, 66 S. Ct. 1142.***

This case involves the validity of the provisions of a contract of insurance which, it is conceded, was made outside and beyond the jurisdiction of the State of Louisiana. The Gillette Company, which has its home office in

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18. **See Osborn v. Ozlin,** 310 U. S. 53, 62; 84 L. Ed. 1074, 1078, 60 S. Ct. 758.

Massachusetts, and its subsidiary, The Toni Company, which is domiciled in Illinois, purchased the contract of liability insurance to indemnify themselves against any amounts they may be "legally obligated to pay" by reason of their negligence, if any. Although the contract provides coverage throughout a wide territory, it contains a valid no action clause which provides that negligence actions must be filed against the insureds; the third party claimants have no right to proceed against the insurer until judgments are first obtained against the insureds. Obviously, the contract did not contemplate performance in Louisiana, because the insureds are not domiciled there, have not been qualified to do business there and have no agent for service of process there.

The contract was executed and issued by the Massachusetts office of the insurance company, appellee, and was delivered to the Toni Company in Illinois. As stated previously, the contracting parties specifically declared that the contract would be governed by the laws of the State of Massachusetts, where it was issued. The "cost-plus" premium was to be paid and losses, if any, adjusted at six-month intervals in Massachusetts. Although appellee happened to be doing other business in Louisiana, the contract herein sued upon is obviously not part of its Louisiana business. At the time the contract was entered into, Louisiana had no interest in the risk covered.

The no action clause, admittedly valid in Massachusetts and Illinois, goes to the obligation of the contract and cannot be subsequently invalidated in Louisiana. Whereas Louisiana admittedly has the power to regulate

the Louisiana business of insurance companies, it has no power to regulate or invalidate insurance contracts entered into in other states, valid where made. This is particularly true of the present case, where none of the parties to the contract are citizens of Louisiana, performance there is not contemplated, and the risk, being for indemnity conditioned upon a final judgment against the insureds, is not located there. Louisiana's connection with this contract is slight.

In *Allgeyer v. State of Louisiana*, supra, this Court upheld the right of a citizen of Louisiana to enter into a contract outside the State of Louisiana for insurance on his property, even though the property was temporarily located in Louisiana. This Court said:

> "We have then a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the State of Louisiana being made and to be performed within the State of New York, where the premiums were to be paid and losses, if any, adjusted. • • • We are not dealing with the contract. If it be legal in New York, it is valid elsewhere. • • • It was a valid contract, made outside of the state, to be performed outside of the state, although the subject was property temporarily within the state."

In *St. Louis Cotton Compress Co. v. Arkansas*, supra, this Court said:

> "It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside."

In *Connecticut General Life Insurance Company v. Johnson*, supra, this Court said:

> "The due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere."

In *New York Life Insurance Company v. Head*, 234 U. S. 149, 161, 58 L. Ed. 1259, 1264, 34 S. Ct. 879, this Court said:

> "It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state and in the State of New York, and there destroy freedom of contract without drawing down the constitutional barriers by which all the states are restricted within the orbits of their lawful authority, and upon the preservation of which the government under the Constitution depends."

In *Aetna Life Insurance Co. v. Dunken*, 266 U. S. 389, 69 L. Ed. 342, 45 S. Ct. 129, this Court held that in the absence of an express stipulation in the contract, state statutes relating to insurance do not affect the validity of a policy issued by the insurer in another state.

In 1944, when this Court, in *United States v. South-Eastern Underwriters Association*, supra, held that the business of insurance involves interstate commerce, Congress promptly took steps to insure the continued regulation of insurance by the states (see previous history of Louisiana direct action statute in relation to the McCarren Act). The McCarran Act was passed in 1945, providing that the business of insurance "shall be subject to the laws of the several states which relate to the regulation or tax-

ation of such business." In enacting this Act, Congress did not intend to clothe the states with any power to regulate the business of insurance beyond that which they previously possessed. Congress was fully aware of the limitations placed upon the power of states to regulate insurance contracts entered into outside their borders and intended that the same limitations would continue. The House Report on the Bill as enacted provides as follows:

> "Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, *subject always, however to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance in Allgeyer v. Louisiana (165 U. S. 578), St. Louis Cotton Compress Co. v. Arkansas (260 U. S. 346), and Connecticut General Insurance Co. v. Johnson (303 U. S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or re-insurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.*"
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> (H. R. Rep. No. 143, 79th Congress, First Session, 3, 1945).

This unequivocal expression of congressional meaning, as stated, is decisive of the issues presented in this case. Congress did not provide that the business of insurance in the United States shall be subject to the laws of the State of Louisiana, but provided that each state has the power to regulate the business of insurance within its jurisdiction.

This Court in *Prudential Insurance Company v. Benjamin*, supra, outlined the history of the jurisprudence leading up to its decision in the *South-Eastern Underwriters* case, the McCarran Act, and jurisprudence thereafter, and stated (328 U. S. 408, 416, 90 L. Ed. 1342, 1353, 66 S. Ct. 1142):

> "Due process in its jurisdictional aspects remained to confine the reach of state power in relation to business affecting other states."

Accordingly, it is clear that Louisiana has no power to regulate contracts of insurance entered into outside its jurisdiction, even if such contracts are entered into by Louisiana citizens or cover risks within the State. The contract here involved was not entered into by a Louisiana citizen and, as we have demonstrated, did not cover risks within the State. Louisiana has no power to regulate the contract of insurance involved because the Constitution and Congress, in enacting the McCarran Act, have placed control elsewhere.

APPLICATION OF THE LOUISIANA DIRECT ACTION STATUTE TO ABROGATE THE NO ACTION CLAUSE IN THE INSURANCE CONTRACT HERE INVOLVED, WHICH IS ADMITTEDLY VALID WHERE THE CONTRACT WAS MADE AND DELIVERED, WOULD DEPRIVE APPELLEE OF PROPERTY WITHOUT DUE PROCESS OF LAW, IMPAIR THE OBLIGATION OF THE CONTRACT, DENY EQUAL PROTECTION OF THE LAWS AND FAIL TO GIVE FULL FAITH AND CREDIT TO THE STATUTES AND JURISPRUDENCE OF OTHER STATES, CONTRARY TO THE CONSTITUTION OF THE UNITED STATES. ***Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143, 78 L. Ed. 1178, 54 S. Ct. 634; Lauritzen v. Larsen, 345 U. S. 571, 97 L. Ed. 1254, 73 S. Ct. 921; Home Insurance Co. v. Dick, 281 U. S. 397, 74 L. Ed. 926, 50 S. Ct. 338; Boseman v Connecticut General Life Ins. Co., 301 U. S. 196, 81 L. Ed. 1036, 57 S. Ct. 686; Pritchard v. Norton 106 U. S. 124, 27 L. Ed. 104, 1 S. Ct. 102.***

The contract in the present case, issued in Massachusetts, did not obligate the indemnitor, or insurer, to pay even the insured merely on proof of damage or injury to someone else. It was conditioned upon any such claimed liability first being liquidated and determined between the insured and any third person who might assert it. It is admitted that this condition is binding upon the insured and, accordingly, it should be equally as binding upon third persons who are not even parties to the contract. It has been shown that, in forty-four states covered by the policy, the mere mention of insurance in a negligence action constitutes reversible error and an action may not be instituted against the insurer in the first instance. The condition requiring final judgment against the insured, before the insurance company is obligated, is

valid and enforceable. On the other hand appellants contend that the Louisiana direct action statute invalidates the no action clause and that the injured person may file suit against the insurer direct, without ever having brought suit or obtained a judgment against the insured. Appellee's obligation under its contract cannot be varied or enlarged to that extent. The Louisiana statute, if construed to have the effect contended by appellants, would deprive appellee of substantial and valuable rights. The policy in this case is a Massachusetts contract and the law of that state entered into it and became a part of it, not only by operation of law but by express agreement of the parties. Louisiana cannot make it a different and more onerous one than the contract entered into outside her borders.

In the case of *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, supra, a contract of fidelity insurance was valid in Tennessee, where made and intended to apply, but its nature and terms were such that it covered the risk in any other state, if the business of the insured, as actually happened, was carried on there. The promise of the insurer ripened into an obligation in Mississippi through the dishonesty of an employee there. The contract provided that any claim thereunder must be made upon the defendant within fifteen months after the termination of the suretyship for the defaulting employee. This condition was valid in Tennessee, but was in violation of the statutes in Mississippi, where the suit was brought. In upholding the insurer's defense under the provisions of the Tennessee contract, this Court said:

"The Mississippi statutes, so construed, deprived the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory (Hooper v. California, 155 U.S. 648, 15 S. Ct. 207, 39 L. Ed. 197; Orient Insurance Co. v. Daggs, 172 U. S. 557, 565, 566, 19 S. Ct. 281, 43 L. Ed. 552; New York Life Ins. Co. v. Cravens, 178 U. S. 389, 398-399, 20 S. Ct. 962, 44 L. Ed. 1116); *but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made.* 34 S. Ct. 879, 58 L. Ed. 1259; (New York Life Ins. Co. v. Head, 234 U. S. 149; Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 399, 45 S. Ct. 129, 69 L. Ed. 342.) *Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen.* Home Insurance Co. v. Dick, 281 U. S. 397, 407-408, 30 S. Ct. 338, 74 L. Ed. 926.

"It is urged, however, that in this case the interest insured was in Mississippi when the obligation to idemnify the appellee matured, and it was appellant's duty to make payment there; and these facts justify the state in enlarging the appellant's obligation beyond that stipulated in the bond, to accord with local public policy. The liability was for the payment of money only, and was conditioned upon three events, loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship. All of these conditions were of substantial importance, all were lawful in Tennessee, and all go to the obligation of the contract. It is

true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of loss, as were both obligor and obligee. The contract being a Tennessee contract and lawful in the state, could Mississippi without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (Home Insurance Co. v. Dick, supra, page 408, of 281 U. S., 50 S. Ct. 338, 74 L. Ed. 926), *it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment.* Aetna Life Ins. Co. v. Dunken, supra; Home Insurance Co. v. Dick, supra. *Cases may occur in which enforcement of a contract as made outside a state may be so repugnant to its vital interests as to justify enforcement in a different manner.* Compare Bond v. Hume, 243 U. S. 15, 22, 37 S. Ct. 366, 61 L. Ed. 565. *But clearly this is not such a case.*" (292 U. S. 143, 54 S. Ct. 636).

The foregoing decision by this Court is considered to be closely analogous to the facts and decisive of the constitutional issues presented in the present case. There was no intention to violate any law when the contract was entered into in Boston, Massachusetts. The contracting parties acted in good faith and intended that the contract should be governed by the laws of Massachusetts. The presumption is that they intended to contract with reference to the law of the state in which the contract would be valid, not with reference to the law of Louisiana, which would invalidate a substantial portion thereof. In fact, they clearly evidenced an intention that the contract should be governed by the laws of the State of Massachusetts by providing that terms of the policy should conform to the laws of the state in which the policy was issued. In *Pritchard v. Norton*, supra, this Court held that it must be presumed that parties to a contract contemplated a law according to which their contract would be upheld, rather than one by which it would be defeated. This Court said (106 U. S. 124, 136, 27 L. Ed. 104, 108, 1 S. Ct. 102):

> "The parties cannot be presumed to have contemplated a law which would defeat their engagements."

In *Boseman v. Connecticut General Life Ins. Co.*, supra, this Court said (301 U. S. 196, 202, 81 L. Ed. 1036, 1039, 1040, 57 S. Ct. 686):

> "The oil corporation (insured) and respondent (insurer) intended, and the policy definitely declares, that Pennsylvania law should govern. Undoubtedly, as between employer and insurer, Pennsylvania law controls. In every forum a contract is governed

by the law with a view to which it was made. But the precise issue for decision is whether, as between petitioner and insurer, the policy provision requiring notice of claim is governed by Pennsylvania law or Texas law. * * *

"The conclusion that Pennsylvania law governs the policy provision requiring notice of claim is supported not only by the *making and delivery of the contract of insurance in that state, the declaration in the policy that Pennsylvania law shall govern* and petitioners' acceptance of the insurance according to the terms of the policy but also by *the purpose of the parties to the contract that everywhere it shall have the same meaning and give the same protection and that inequalities and confusion liable to result from applications of diverse state laws shall be avoided.*"

In *Lauritzen v. Larsen*, supra, this Court said (345 U. S. 571, 590-592, 97 L. Ed. 1254, 1272, 73 S. Ct. 921):

"We have held it a denial of due process of law when a state of the Union attempts to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum state. *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U. S. 143, 78 L. Ed. 1178, 54 S. Ct. 634, 92 A. L. R. 928; *Home Ins. Co. v. Dick*, 281 U. S. 397, 74 L. Ed. 926, 50 S. Ct. 338, 74 A. L. R. 701. *The purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way regardless of the fortuitous circumstances which often determine the forum.* * * *"

"Because a law of the forum is applied to plaintiffs who voluntarily submit themselves to it is no argu-

ment for imposing the law of the forum upon whose who do not."

Compare: *Home Insurance Company v. Dick*, supra, *Bradford Electric Light Co. v. Clapper*, supra; *Modern Woodmen of America v. Mixer*, 267 U. S. 544, 550, 69 L. Ed. 783, 785, 45 S. Ct. 389; *Order of United Commercial Travelers of America v. Wolfe*, 331 U. S. 586, 91 L. Ed. 1687, 67 S. Ct. 1355, and *Hughes v. Fetter*, 341 U. S. 609, 95 L. Ed. 1212, 71 S. Ct. 980.

The foregoing authorities and the cases cited therein hold that Louisiana must give full faith and credit to the statutes and jurisprudence of Massachusetts and Illinois, and that to apply the Louisiana direct action statute under the circumstances here presented would deprive appellee of property without due process of law and deny equal protection of the laws. The obligation of the contract herein sued upon is obviously impaired if the Louisiana statute is applied to invalidate a substantial portion thereof. The guaranty of the Contract Clause to the Federal Constitution relates not to the date of the enactment of a statute, but to the date of its effect on contracts. When issued, the contract was not subject to Louisiana law. Act 541 of 1950, as above demonstrated, does not purport to regulate the provisions of contracts of liability insurance entered into outside the State of Louisiana. The first clause of the Act still restricts its application to those policies of liability insurance "issued and delivered in Louisiana". The proviso added to the direct action statute by Act 541 of 1950 does not recognize a right of

direct action on a policy issued outside the State until the occurence of an accident or injury within the State of Louisiana."[19]

It is clear that the direct action statute did not purport to operate upon the contract until the happening of the accident and the bringing of the present action in the Louisiana courts. Hence, the statute violates the contract clause. See *Home Insurance Company v. Dick*, supra, (281 U. S. 397, 411, 74 L. Ed. 926, 935, 50 S. Ct. 338).

The policy of insurance sued upon herein was effective from July 1, 1951 to July 1, 1952, but, as above demonstrated, was a renewal of the policy involved in the case of *Bish v. Employers Liability Assurance Corporation, Ltd.*, supra, which was effective July 1, 1950 to July 1, 1951. The endorsement to the policy herein sued upon shows that the "cost-plus" premium is computed at six-month intervals until June 30, 1955 (R. 64). Act 541 of 1950 became effective July 26, 1950, and the courts below in the *Bish* case held that the statute, if construed to apply, violated the obligations of the contract. By the same token, the obligations of the same contract, renewed and now under consideration, were violated.

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19. In **West v. Monroe Bakery**, 217 La. 189, 46 So. (2d) 122, the Louisiana Supreme Court said:

"An analysis of our jurisprudence considered by the appellate court in reaching its conclusion discloses that with two exceptions, Act 55 of 1930 has been treated consistently as conferring **substantive rights** on third parties to contracts of public liability insurance,**which become vested at the moment of the accident in which they are injured.** . . . ."

SINCE THE PROVISIONS OF LOUISIANA ACT 541 OF 1950, IF APPLIED TO A POLICY ISSUED AND DELIVERED OUTSIDE THE STATE OF LOUISIANA, ARE UNCONSTITUTIONAL, LOUISIANA ACT 542 OF 1950, REQUIRING THE "CONSENT TO BE SUED", IS EQUALLY UNCONSTITUTIONAL. ***Frost v. Railroad Commission of California, 271 U. S. 583, 70 L. Ed. 1101, 46 S. Ct. 605; Connecticut General Life Ins. Co. v. Johnson, supra; Hanover Fire Insurance Co. v. Carr, 272 U. S. 494, 71 L. Ed. 372, 47 S. Ct. 179; Home Insurance Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365, 87 U. S. 445; Power Mfg. Co. v. Saunders, 274 U. S. 490, 71 L. Ed. 1165, 47 S. Ct. 678.***

On page 22 of their brief, appellants make the following statement:

> "Obviously, if Act 541 is constitutional, i.e., if the Legislature had the power to say: 'this right of action shall exist whether the policy of insurance sued upon was written and delivered in the State of Louisiana or not' then it had the additional power to require foreign insurance companies to agree to put themselves on the same basis as Louisiana companies. Conversely, *it is also obvious that if the Legislature lacked the power to enact the quoted words, then it lacked the power to force a foreign insurance company to sign the consent agreement.*
>
> "Since Act 542 will either stand or fall with Act 541 it would serve no useful purpose to discuss it further."

Appellee agrees that the above statement disposes of any additional issues as to the validity of the Louisiana direct action statute. Clearly, since the provision in

Louisiana Act 541 of 1950, extending the right of direct action to policies issued and delivered outside of Louisiana, is unconstitutional, Act 542 of 1950, forcing a foreign insurance company to consent to such action, is equally unconstitutional. In *Frost v. Railroad Commission of California*, supra. this Court said:

> *"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold."*

In *Connecticut General Life Ins. Co. v. Johnson*, supra, this Court said (303 U. S. 77, 79, 80, 82 L. Ed. 673, 677, 58 S. Ct. 436):

> "No contention is made that appellant has consented to the tax imposed as a condition of the granted privilege to do business within the State. *Nor could it be.* • • • A corporation which is allowed to come into a state and there carry on its business may claim, as an individual may claim, the protection of the Fourteenth Amendment against a subsequent application to it of state law."

It is well settled that the admission of foreign corporations into a state may not be conditioned upon the surrender of Constitutional rights. A statute requiring a corporation, as a condition precedent to obtaining a permit to do business within the state, to surrender a right and privilege secured to it by the Constitution and laws

of the United States, is unconstitutional and void. One cannot by acquiescence make valid that which is void. *Home Ins. Co. of New York v. Morse*, supra; *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 400, 72 L. Ed. 927, 929, 48 S. Ct. 553; *Terral v. Burke Constr. Co.*, 257 U. S. 529, 66 L. Ed. 352, 42 S. Ct. 188; *Hanover Fire Ins. Co. v. Carr*, supra; *Frost v. Railroad Commission of California*, supra; *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. Ed. 1013, 26 S. Ct. 619; *Power Manufacturing Co. v. Saunders*, supra; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. Ed. 619, 21 S. Ct. 423; *Buck v. Kuykendall*, 267 U. S. 307, 69 L. Ed. 623, 45 S. Ct. 324; *Lafayette Insurance Co. v. French*, 59 U. S. 404, 18 How. 404, 15 L. Ed. 451; *Barron v. Burnside*, 121 U. S. 186, 30 L. Ed. 915, 7 S. Ct. 931; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 207, 36 L. Ed. 942, 945, 13 S. Ct. 44; *Connecticut General Life Ins. Co. v. Johnson*, supra; *Williams v. Standard Oil Co. of La.*, 278 U. S. 235, 241, 73 L. Ed. 287, 49 S. Ct. 115; *State of Washington ex rel. Bond & Goodwin & Tucker v. Superior*, 289 U. S. 361, 77 L. Ed. 1256, 1260, 53 S. Ct. 624; *Phillips Petroleum Co. v. Jenkins*, 297 U. S. 629, 80 L. Ed. 943, 56 S. Ct. 611; *Schwegmann Bros. v. La. Board*, 216 La. 148, 43 So. (2d) 248.

ANSWER TO APPELLANTS' BRIEF

THIS COURT IS NOT BOUND BY THE DECISIONS OF LOUISIANA STATE COURTS RELATING TO THE ISSUES HERE PRESENTED.

Appellants contend that the Louisiana Direct Action Statute, in granting the injured person a right of action which would not otherwise exist, is purely proced-

ural and contains nothing substantive, and accordingly, the case must be governed by Louisiana law. They further contend that this Court is bound by Louisiana's conflict-of-laws decisions. Their argument is not sound. This case raises questions as to whether the Louisiana statute violates the Federal Constitution and raises Federal questions of substance, which must be determined by decisions of this Court and appellate courts of the United States. The Federal claim may not be disposed of by saying that the statute is purely procedural.

It is true that under *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, Courts of the United States are bound to follow the decisions of the courts of last resort of the States in cases wherein jurisdiction is based on diversity of citizenship. However, where a defense is made, based on the Laws or Constitution of the United States, this Court determines the issues for itself.

The Rules of Decision Act, 28 U. S. C., Section 1652, provides as follows:

> "The laws of the several states, *except where the Constitution or Treaties of the United States or Acts of Congress otherwise require or provide*, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply."

The Act itself plainly states that Federal courts are not to be bound by the decisions of a state court where the constitutionality of a state statute is involved. A state may be limited in its conflict of laws rules by pro-

visions of the Federal Constitution. It follows of necessity that Federal Courts are not bound by local rules of conflict of laws or policy where the application of such rules will result in a violation of the Constitution or Federal law.

In *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020, this Court said that:

> "*Subject only to review on any Federal question that may arise*, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law."

It is well settled that a Federal court is not bound to follow a local rule of conflict of laws where the application of such rule would violate the Federal Constitution. *Irving Trust Co. v. Day*, 314 U. S. 556, 561, 86 L. Ed. 452, 457, 62 S. Ct. 398; *Sampson v. Channell*, 110 F. (2d) 754, certiorari denied, 310 U. S. 650, 84 L. Ed. 1415, 60 S. Ct. 1099; *Clark v. Order of United Commercial Travelers*, 177 F. (2d) 467, certiorari denied, 399 U. S. 922, 94 L. Ed. 1345, 70 S. Ct. 610.

In *Home Insurance Co. v. Dick*, supra (281 U. S. 397, 407, 74 L. Ed. 926, 933, 50 S. Ct. 338), this Court said:

> "The objection that, as applied to contracts made and to be performed outside of Texas, the statute violates the Federal Constitution, raises Federal questions of substance, *and the existence of the Federal claim is not disposed of by saying that the statute, or the one year provision in the policy, relates to the remedy and not to the substance.*"

THE LOUISIANA DIRECT ACTION STATUTE IS NOT PURELY PROCEDURAL

Appellants try to avoid the issues here raised by saying that the Louisiana statute, in granting the injured person a right of action which would not otherwise exist, is purely procedural and contains nothing substantive, and accordingly, this case must be governed by Louisiana law. Their argument is not sound. Since this case raises a question as to whether the State statute violates the Federal Constitution or laws, the Federal claim may not be disposed of by saying the statute is purely procedural.

It is clear that any statute which creates a right of action, gives rise to a cause of action, or which confers upon a party in the first instance the right to bring suit, is substantive law.[20] A remedy alone is meaningless and cannot exist without a right or cause of action to enforce. Before the passage of the direct action statute, as above set forth, it was clearly recognized in Louisiana that the injured person was a stranger to a contract of liability insurance and had no rights under the policy. The statute gave him a privilege which he did not theretofore have; it created a right of direct action against the insurer alone.

Clearly, the Louisiana statute is not purely procedural but conferred upon the injured party a substantive right of direct action against the insurer, and the Louisiana courts have so held. The opinion of the Dis-

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20. **State v. Elmore,** 177 La. 1057, 155 So. 896; **Matney v. Blue Ribbon,** 12 So. (2d) 249, affirmed 202 La. 505, 12 So. (2d) 253.

trict Court below was rendered on September 12, 1952 (R. 32) and the judgment appealed from was entered on September 29, 1952 (R. 35-36). At that time, the jurisprudence was firmly established in Louisiana that the direct action statute was not purely procedural but conferred substantive rights upon the injured person. In each of the seven companion cases referred to at the outset of this brief, the Federal courts in Louisiana have held that the Louisiana statute is substantive and not purely procedural. In *New Amsterdam Casualty Co. v. Soileau*, 167 F. (2d) 767, decided in May of 1948, the Court of Appeals, Fifth Circuit, said:

> "The 1930 Act is not wholly procedural, for it confers also a *substantive right* upon the injured party in the direct action granted such party against the insurer."

The latest expression on the subject by Louisiana State courts was found in the case of *West v. Monroe Bakery*, 217 La. 189, 46 So. (2d) 122, decided March 20, 1950; rehearing denied April 24, 1950, wherein the Louisiana Supreme Court said:

> "An analysis of our jurisprudence considered by the appellate court in reaching its conclusion discloses that with two exceptions Act 55 of 1930 has been treated consistently as conferring *substantive rights* on third parties to contracts of public liability insurance, which become vested at the moment of the accident in which they are injured. . . ." (Italics by the Court).

Despite the foregoing decision by the Louisiana Supreme Court, with emphasis placed upon the words "substantive rights" by that Court itself, and the decisions of the Federal Courts referred to, appellants assert on pages 8, 9, 12 and 25 of their brief that Louisiana courts have *"consistently"* and *"without exception"* held that the direct action statute is purely procedural and contains nothing substantive. They are not correct. Appellants apparently rely heavily upon a decision of the Louisiana Supreme Court in *Home Indemnity Co. v. Highway Ins. Underwriters*, 222 La. 540, 62 So. (2d) 828, wherein the Court, without even referring to its previous holding in the *West v. Monroe Bakery* case, supra, declared that the direct action statute is remedial legislation and that "subrogation is recognized as substantive law". That decision was rendered on December 15, 1952, and rehearing was denied January 12, 1953, both *after* the opinion and judgment of the District Court below in this case. It is well settled that a decision of the highest court of a state, construing a state statute otherwise than it had been *previously* construed by a Federal Court, does not make the judgment of the Federal Court erroneous.

In *Concordia Ins. Co. v. School District*, 282 U. S. 545, 552, 553, 75 L. Ed. 528, 542, 543, 51 S. Ct. 275, this Court said:

> "But that inquiry may be put aside since the decision (of the state court) was handed down on April 8, 1930, more than a year after the present judgment had been entered by the Federal District Court, and whatever may be the prospective effect of this last decision, it cannot be given a retroactive effect in

respect of the judgment of the Federal District Court so as to 'make that erroneous which was not so when the judgment of that court was given'. *Morgan v. Curtenius*, 4 How. 1, 3; 15 L. Ed. 823, 824; *Pease v. Peck*, 18 How. 595, 598, 15 L. Ed. 518, 520; *Roberts v. Bolles*, 101 U. S. 119, 128, 125, 25 L. Ed. 880, 884; *Burgess v. Seligman*, 107 U. S. 20, 35, 27 L. Ed. 359, 365, 28 S. Ct. 10; *Edward Hines Yellow Pines Trustees v. Martin*, 268 U. S. 458, 69 L. Ed. 1050, 45 S. Ct. 543; *Fleischman Co. v. Murray*, (C.C.), 161 Fed. 162."

The foregoing decision of this Court also recognizes that where it cannot be said that the highest court of a state has definitely so construed a state statute as to settle a question under it, a Federal Court having such question is free to construe the statute for itself. The construction of the statute by the courts below in this and the seven companion cases referred to at the outset of this brief, that the statute confers a substantive right of action upon the injured party, is correct.

THE LOUISIANA DIRECT ACTION STATUTE IS UNIQUE

Louisiana is the only state which has a statute permitting the injured person to file a direct action *at law*, against a liability insurer *alone*, where the policy was *voluntarily* obtained by the insured. Appellants, on page 20 of their brief, refer to statutes of fifteen other states and claim that these statutes are "somewhat similar" to the Louisiana statute involved. The statutes referred to, with the exception of Rhode Island and Wisconsin, deal with the rights of an injured party to proceed *in equity* against

the insurer, or his rights of action under a *required or compulsory* liability policy, usually covering motor vehicles. They have no application whatever to this case, where the action would be tried at law before a jury and the insurance policy was voluntarily obtained by the insured. The statutes of Rhode Island and Wisconsin, although similar in many respects to the Louisiana statute, require the *joinder* of the insured in any action against the insurer. It is especially persuasive that the Supreme Courts of both Rhode Island and Wisconsin have held that their direct action statutes cannot be given extra territorial effect without violating the constitutional provisions relied upon by appellee in this case. The jurisprudence of Rhode Island is evidenced by the cases of *Coderre v. Travelers Insurance Co.*, 48 R. I. 152, 136 A. 305, and *Riding v. Travelers Insurance Co.*, 48 R. I. 433, 138 A. 186. The most recent decision on the subject by the Supreme Court of Wisconsin is *Ritterbusch v. Sexmith*, 256 Wis. 507, 41 N. W. (2d) 611, 16 A. L. R. (2d) 873 which directly supports the position of appellee herein, wherein the Court said:

> "The policy stands, then, as a contract made in Massachusetts whose obligations are established and to be construed by the effect which Massachusetts law gives them. It is conceded that in that state the no action clause is valid. This being so, *it secured to the insurer a valuable contractual right and an application of Sec. 260.11 (1) of the Wisconsin Statutes* (Wisconsin's direct suit statute) *at the time of performance would impair that right and is thus forbidden by Section 10, Article 1 of the United States Constitution.*"

THE PUBLIC POLICY OF MASSACHUSETTS AND ILLINOIS TO PROTECT THE CONTRACTING PARTIES OUTWEIGHS THE ALLEGED PUBLIC POLICY OF LOUISIANA TO PROTECT THIRD PARTIES.

Appellants contend that it is the public policy of Louisiana to protect the injured person and, therefore, the valid no action provision of the Massachusetts contract should not apply. The mere statement that it is Louisiana's public policy to protect the injured person is overcome by the fact that Louisiana does not require manufacturers to carry compulsory liability insurance of any kind. In the absence of compulsory insurance, many Louisiana citizens may be injured without reccurse against an insurer, but that apparently is of no concern to the Louisiana Legislature. In *Ritterbusch v. Sexmith*, supra, the Supreme Court of Wisconsin said:

> "Everyone who has a driver's license is at liberty to run his car upon the highway without any insurance whatever. If he may do this it seems clear that he may buy whatever insurance he pleases and if what he may buy in Wisconsin does not please him he may look elsewhere. If, then, he brings from another state what may legally be sold to him there we see no public policy against it even though such insurance may not be as beneficial to an injured person as the sort sold here. In the absence of compulsory insurance of a prescribed kind the Wisconsin automobilist has the right to obtain what he likes or none at all and he does not bring into the state for the benefit of the plaintiff more than he purchased."

In addition, the Louisiana Supreme Court, in *Davies v. Consolidated Underwriters*, 199 La. 459, 6 So. (2d) 351, 357, has recognized that "rarely has the injured party knowledge as to who may be the insurer of the party responsible for his injuries". The Gillette Company and the Toni Company, non-residents of Louisiana, did not have to be insured at all. They voluntarily purchased in Massachusetts a contract to indemnify themselves against loss, but that is of no concern to Louisiana.

The making or enforcement of a contract of insurance of the kind involved in this case is not against the public policy of Massachusetts. [21] Indeed, as above pointed out, it is the public policy of forty-four states, including Massachusetts, to protect the actual parties to a contract of liability insurance, to give full validity to the no action clause, and to avoid prejudice by keeping any knowledge of the defendant's insurance from the jury. It has been recognized that, despite the absence of a no action clause from the insurance contract, it is against public policy to permit the insurer to be joined in the negligence action. [22]

The policy policy of Massachusetts to protect parties to the contract outweighs the alleged public policy of Louisiana to protect third parties.

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21. **Miller v. United States Fidelity & Guaranty Co.**, 291 Mass. 445, 197 N. E. 75, 78.

22. F. N. Appleman, "Automobile Liability Insurance", page 306; **Hertz v. Hudson Motor Car Co.**, 8 F. R. D. 431, and **Pitcairn v. Rumsey**, 32 F. Supp. 146.

THE APPELLANTS' CASES

In *Washington ex rel Bond & G. & T. v. Superior Court*, 289 U. S. 361, 77 L. Ed. 1256, 53 S. Ct. 624, this Court said:

> "It is true that the corporation's entry may not be conditioned upon surrender of constitutional rights * * *. *And for this reason a State may not exact arbitrary and unreasonable terms respecting suits against foreign corporations as the price of admission.*"
>
> (Citing *Power Mfg. Co. v. Saunders*, 274 U. S. 490, 71 L. Ed. 1165, 47 S. Ct. 678).

In the above case, the statute merely required the corporation on withdrawal to leave an agent for service of process in the state until the statute of limitations had run. This Court said that "the provision that the liability thus to be served should continue after withdrawal from the State afforded a lawful and constitutional protection of persons who had *there* transacted business with the appellant." No question of extra territoriality of the statute was involved.

Hoopeston Canning Co. v. Cullen, 318 U. S. 313, 87 L. Ed. 777, 63 S. Ct. 602, involved reciprocal insurance associations which insured *immovable property* located in New York against fire and related risks. Although the policies were issued in Illinois, this Court held that New York regulations applied because the insured's interest was located in the state and said that "contracts formally made in other states may remain subject to the law of the

state of the situs of the property, particularly in respect to immovables" (318 U. S. 313, 318, 87 L. Ed. 777, 783, 63 S. Ct. 602). This Court recognized that the rule would not apply where the state had no actual contact with the insurance contract, the property insured was elsewhere, and the contract was made elsewhere, citing *Home Ins. Co. v. Dick*, supra.

California Auto. Ass'n. v. Maloney, 341 U. S. 105, 95 L. Ed. 788, 71 S. Ct. 601, involved the validity of a compulsory assigned risk law providing for apportionment among automobile insurers of applicants for local insurance, who could not obtain policies through ordinary methods. This Court upheld the law on the theory that the local needs should be serviced by insurers and emphasized the interest of the state in clearing the highways of irresponsible drivers and in trying to control highway accidents. The case is confined to local compulsory automobile insurance, does not deal with the extra territoriality of the statute, and is not applicable to the facts of the present case.

In *International Shoe Co. v. Washington*, 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154, this Court held that the systematic and continuous activities of a shoe company in the State of Washington established sufficient contacts with the state of the forum to make it reasonable to permit the state to enforce the obligations which the shoe company incurred *there*. It did not hold that obligations incurred elsewhere could be enforced in Washington by the same method.

In *Griffin v. McCoach*, 313 U. S. 498, 85 L. Ed. 1481, 61 S. Ct. 1023, this Court, in remanding the case to the Court of Appeals, recognized that if the Court of Appeals was correct in its view that the Federal Constitution foreclosed application of a local public policy to a foreign contract, the only question to be decided would be whether the contract sued upon was a local contract.

In the case *Alaska Packers Ass'n. v. Industrial Accident Commission*, 294 U. S. 532, 79 L. Ed. 1044, 55 S. Ct. 518, this Court held that where a contract was entered into in California, even though it was to be performed elsewhere, its terms, its obligation and its sanctions were subject, in some measure, to the legislative control of California. The fact that the contract was to be performed elsewhere did not put these incidents beyond reach of the power which California could constitutionally exercise. The case supports appellee's position and is authority for the proposition that the valid no action clause in the Massachusetts contract here involved should be enforced in Louisiana. With reference to the validity of the Louisiana direct action statute, the following statement by this Court (294 U. S. 532, 540, 79 L. Ed. 1044, 1048, 55 S. Ct. 518) is applicable:

> "The due process clause denies to a state any power to restrict or control the obligation of contracts executed and to be performed without the state, as an attempt to exercise power over a subject matter not within its constitutional jurisdiction. New York L. Ins. Co. v. Head, 234 U. S. 149, 162-164, 58 L. Ed. 1259, 1264-1266, 34 S. Ct. 879; New York L. Ins. Co. v. Dodge, 246 U. S. 357, 377, 62 L. Ed. 772,

783, 38 S. Ct. 337, Ann. Cas. 1918E, 593; Home Ins. Co. v. Dick, 281 U. S. 397, 407, 408, 74 L. Ed. 926, 933, 934, 50 S. Ct. 338, 74 A. L. R. 701; compare National Union F. Ins. Co. v. Wanberg, 260 U. S. 71, 75, 67 L. Ed. 136, 138, 43 S. Ct. 32. Similarly, a state may not penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state. Allgeyer v. Louisiana, 165 U. S. 578, 41 L. Ed. 832, 17 S. Ct. 427; St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 348, 67 L. Ed. 297, 298, 43 S. Ct. 125; Compania General de Tobacos de Filipinas v. Collector of Internal Revenue, 275 U. S. 87, 75 L. Ed. 177, 48 S. Ct. 100."

The present case does not involve insurance on automobiles or immovable property located in Louisiana. It does not involve insurance obtained under a state compulsory insurance statute, nor the validity of an insurance contract entered into in the State of Louisiana. On the issues presented, the foregoing authorities actually support appellee's position.

CONCLUSION OF ARGUMENT ON THE MERITS

Louisiana Act 541 of 1950, by providing for a direct action against the insurer "whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action", is directed not at the regulation of insurance within the State but at the making of contracts without. Louisiana has no power to

regulate or abrogate provisions in the contract of insurance here involved, validly made outside her borders, because the Federal Constitution and Congress, in enacting the McCarran Act, have placed control elsewhere.

The statute, in attempting to give Louisiana control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into Louisiana contracts, violates the due process provisions of the Federal Constitution. Louisiana's connection with the insurance contract in this case is slight. None of the contracting parties are citizens of Louisiana, performance there is not contemplated, and the risk, being for indemnity conditioned upon a final judgment against the insureds, is not located there. The Louisiana statute cannot impair the obligations of a contract validly made in Massachusetts. Full faith and credit must be given to the statutes and jurisprudence of Massachusetts. The insurer cannot be subjected to bias and prejudice by trial before a jury under the circumstances without depriving it of equal protection of the laws.

Since Act 541 of 1950, if applicable, is unconstitutional, Act 542 of 1950, forcing the insurer to sign a consent agreement to the direct action, is equally unconstitutional.

The judgments of the courts below in this case, and in the seven companion cases referred to at the outset of

this brief, correctly hold that if Acts 541 and 542 of 1950 are applicable under the circumstances presented here, they violate the provisions of Section 1 of the Fourteenth Amendment (Due Process and Equal Protection clauses), Article I, Section 10 (the Contract clause), and Section 1 of Article IV (the Full Faith and Credit clause), of the Constitution of the United States.

The judgment appealed from should be affirmed.

Respectfully submitted,

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APPENDIX A

ACT 253 of 1918 OF STATUTES OF THE STATE OF LOUISIANA

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That, after the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and, in case of such insolvency or bankruptcy, an action may be maintained within the terms and limits of the policy by the injured person or his or her heirs, against the insurer company.

Section 2. Be it further enacted, etc., That the issuance of any policy against liability which does not contain the clause above specified shall be a misdemeanor, punishable by a fine of not less than fifty dollars ($50.00) and not more than five hundred dollars ($500.00) or imprisonment of not less than one month and not more than twelve months, or both at the discretion of the Judge.

Section 3. Be it further enacted, etc., That this Act shall take effect and be in force from and after October 1, 1918.

Section 4. Be if further enacted, etc., That all laws or parts of laws in conflict herewith be and the same are hereby repealed."

APPENDIX B

ACT 55 OF 1930 OF STATUTES OF THE STATE OF LOUISIANA

Section 1. Be it enacted by the Legislature of Louisiana, That the title of Act 253 of 1918 be amended and re-enacted so as to read as follows:

An Act providing that no policy against liability shall be issued unless it contains a proviso that the insolvency or bankruptcy of the assured shall not release the company from liability for injury sustained or loss occasioned during the life of the policy; prescribing what shall constitute prima facie evidence of insolvency; providing for direct action within the terms and limits of the policy by the injured person, his or her heirs, and the place where such action may be brought; and providing a penalty for the violation of this act.

Section 2. That Section 1 of Act 253 of 1918 be amended and reenacted so as to read as follows:

Section 1. That, after the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and any judgment which may be rendered against the assured, for which the insurer is liable, which shall have become executory, shall be deemed prima facie evidence of the insolvency of the assured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer company. Provided further that the injured

person or his or her heirs, at their option, shall have a right of direct action against the insurer company within the terms, and limits of the policy, in the parish where the accident or injury occurred, or in the parish where the assured has his domicile, and said action may be brought either against the insurer company alone or against both the assured and the insurer company, jointly or in solido.

Provided that nothing contained in this act shall be construed to affect the provisions of the policy contract if the same are not in violation of the laws of this State.

It being the intent of this act that any action brought hereunder shall be subject to all of the lawful conditions of the policy contract and the defenses which could be urged by the insurer to a direct action brought by the insured; provided the terms and condition of such policy contract are not in violation of the laws of this State."

APPENDIX C

ACT 211 OF 1946 OF STATUTES OF THE STATE OF LOUISIANA

AN ACT

Authorizing and directing the Secretary of State to prepare a draft or project of an Insurance Code for the State of Louisiana; providing the manner and time of submitting the said draft; prescribing the method of considering, adopting, enacting and printing said Insurance Code; and providing for the payment of the expenses incident to the execution of this Act.

Whereas, the United States Supreme Court, in the case of United States v. Southeastern Underwriters Association, et al., 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed 1446, has held that the business of insurance is interstate commerce, and, as a result, the 79th Congress of the United States has passed Public Law 15 suspending the operation of certain federal statutes until January 1, 1948, and otherwise preserving to the respective States the power and authority to continue to regulate and tax the business of insurance, all of which has caused innumerable problems to arise in connection with the validity, interpretation and administration of state insurance laws; and

Whereas, the laws pertaining to the subject of insurance in this state have been enacted by various Legislatures from 1855 to the present date, many without relation to others on the same subject, thereby causing confusion and ambiguity; and

Whereas, the subject of insurance is one of great importance and of great public interest; and

Whereas, it has been the experience of a number of other states that an Insurance Code is the most effective means of obtaining clarity of purpose and the efficient operation of insurance laws; Now, Therefore,

Section 1, Be it enacted by the Legislature of Louisiana, That the Secretary of State is hereby authorized and directed to make a survey of the Insurance Codes of other states now in force, and of the insurance laws in effect in this state, and to draft therefrom an Insurance Code to be presented to the 1948 Regular Session of the Legislature for its consideration.

Section 2. That the sum of Ten Thousand Dollars ($10,000.00) per annum, or as much thereof as may be necessary, be withheld and expended by the Secretary of State from the fees collected by his office and paid by insurance companies to defray the expenses incurred in the preparation of said Insurance Code.

Section 3. That the definitive draft of said Insurance Code, as finally approved and recommended by the Secretary of State, together with an explanatory statement and notes, shall be printed and distributed to the Governor, the Attorney General, and the Legislature not later than April 10, 1948.

Section 4. That the Legislature of Louisiana of 1948 shall have the power to consider the Insurance Code of the State of Louisiana and to draft and enact an Insurance Code for the State of Louisiana, as an act of the Legislature, in the usual manner of enactment of laws, as provided in the Constitution, and, if adopted, to print and publish the said Code in book form, in a separate volume under the title "Insurance Code of Louisiana", without including the same in full in the published volume, containing the Acts of the Legislature of 1948; provided, however, that said published volume of the Acts of the Legislature of 1948 shall contain a reference to said Insurance Code by the number and title of the act by which enacted.

Section 5. That the Secretary of State is authorized to employ such persons as are necessary to carry out the provisions of this act and to fix the compensation of technical, professional and clerical employees as needed to complete the work, and that the employees provided for herein shall be subject to the Louisiana Civil Service Laws, rules and regulations.

APPENDIX D

SECTION 14.45 OF ACT 195 OF 1948 OF STATUTES OF THE STATE OF LOUISIANA (THE LOUISIANA INSURANCE CODE)

"No policy or contract of liability insurance shall be issued or delivered in this State, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. Nothing contained in this section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State."

APPENDIX E

TITLE 22: SECTION 655, LOUISIANA REVISED STATUTES OF 1950

"No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person, or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly or in solido. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State."

APPENDIX F

ACT 541 OF 1950 OF STATUTES OF THE STATE OF LOUISIANA

AN ACT

To amend and reenact Section 655 of Title 22, Louisiana Revised Statutes of 1950 to provide that the right of direct action in favor of an injured person or his or her heirs against the insurer shall exist whether the policy of insurance was written or delivered in the State of Louisiana or not, and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana.

Section 1. Be it enacted by the Legislature of Louisiana that Section 655 of Title 22, Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

Section 655. No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liabile which shall have become executory, shall be deemed

prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occured or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state.

Section 2. All laws or parts of laws in conflict herewith are hereby repealed.

APPENDIX G

ACT 542 OF 1950 OF STATUTES OF THE STATE OF LOUISIANA

AN ACT

To amend Section 983 of Title 22, Louisiana Revised Statutes of 1950 by adding thereto a provision that no certificate of authority to do business in Louisiana shall be issued to a foreign or alien liability insurer until such insurer has consented to be sued by the injured person or his or her heirs in a direct action, whether the policy was written or delivered in Louisiana or not, and whether or not the said policy contains a provision forbidding such direct action, provided the accident occurred within the State of Louisiana.

Section 1. Be it enacted by the Legislature of Louisiana that Section 983 of Title 22, Louisiana Revised Statutes of 1950 is hereby amended to add after Subsection "D" a new subsection to be captioned subsection "E" and to read as follows:

E-- No certificate of authority to do business in Louisiana shall be issued to a foreign or alien liability insurer until such insurer shall consent to being sued by the injured person or his or her heirs in a direct action as provided in Section 655 of this title, whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not, and whether or not such policy contains a provision forbidding such direct action, provided that the accident or injury occurred within the State of Louisiana. The said foreign or alien insurer shall deliver to the Secretary of State as a condition precedent to the issuance of such authority, an instrument evidencing such consent.